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J. DOMINIC MONAHAN

September 8, 1994

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street NW
Washington, D.C. 20554

VIA FEDERAL EXPRESS

DOCKET FILE COPY ORIGINAL

RE: Opposition to Petition for Reconsideration of
3-J Broadcasting Company by Resort Broadcasting Company

Dear Mr. Caton:

There is transmitted herewith on behalf of Resort Broadcasting Company, licensee of Station KTVZ(TV), Bend, Oregon, the original and four copies of its Opposition to Petition for Reconsideration of the rulemaking request of 3-J Broadcasting Company.

An extra copy of this transmittal letter is enclosed, as well as a preaddressed, stamped envelope. Please confirm your receipt of the filing of this Opposition by date stamping the extra copy of this transmittal letter and returning it to the undersigned counsel.

Should additional information be desired concerning this Opposition, please contact the undersigned counsel.

RESORT BROADCASTING COMPANY


J. DOMINIC MONAHAN, Its Counsel

cc: John Karousos, Chief, Allocations Branch
Policy and Rules Division (w/enclosure)
Ann C. Farhat, Esquire (w/enclosure)

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In re)
)
Amendment of Section 73.606(b))
Table of Allotments)
Television Broadcast Stations)
to assign Channel 38)
to Bend, Oregon)

TO: Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

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OPPOSITION TO PETITION FOR RECONSIDERATION

Resort Broadcasting Company ("Resort"), the licensee of Station KTVZ(TV), Channel 21, Bend, Oregon, through its counsel, respectfully submits its Opposition to Petition for Reconsideration of the rulemaking filed by 3-J Broadcasting Company ("3-J") in the above entitled matter. In support the following is shown:

Standing: Resort is the owner and operator of Station KTVZ(TV) which is licensed to Bend. Inasmuch as 3-J proposes to add another commercial channel to Bend which would compete for viewers and advertising revenues, Resort has standing to participate in this proceeding. Sanders Bros., 9 RR 2d 2008 (1940).

Background: On June 27, 1994, 3-J submitted its Petition for Rulemaking asking the Commission to amend its Television Table of Allotments to add Channel 38 as a

commercial channel to Bend, Oregon¹. In conjunction with its request 3-J also asked the Commission to waive its "freeze order" set forth in Advance Television Systems, Mimeo No. 4074, released July 17, 1987 (52 FR 28346, July 29, 1987).

By letter dated July 18, 1994, the Chief of the Policy and Rules Division of the Mass Media Bureau denied 3-J's request for a waiver of the freeze order and returned its Petition for Rulemaking as unacceptable for consideration. In that letter the Commission pointed out that waiver requests of the "freeze order" are only considered on a case-by-case basis where the request involves a non-commercial channel proposal or is supported by "compelling" reasons why the freeze should not apply to their particular situation.

In its Petition for Reconsideration 3-J contends that the precedent established in KMTR, Inc. (Ref. No. 8940-MLB, March 5, 1990), supports its waiver of the "freeze order." In that instance an existing television station in Eugene, Oregon filed an application for a construction permit to establish a satellite operation on Channel 36 in Roseburg, Oregon. The station sought a waiver on grounds that the amount of short spacing under the "freeze order" was approximately 19.5 kilometers short of the required 280.8 kilometers². Moreover, the KMTR request was for a permit to build on an existing allocation, not a proposal to add a new allocation. The FCC granted KMTR's request on grounds the

¹ Currently, Bend is served by Station KOAB-TV, a non-commercial station operating on Channel 3 and Station KTVZ, a commercial operation on Channel 21. In addition, non-commercial Channel 15 is also allocated to Bend.

² The "freeze" on new television proposals was imposed because the high densities of existing stations in the top 30 markets limited the spectrum available for high definition television and advanced television service (ATV). Thus, the FCC wanted to preserve its spectrum allocations options for ATV use. Consequently all UHF proposals within 280.8 kilometers of Portland were subject to the freeze.

Roseburg allocation would not impact other existing allocations and that Roseburg was "located close enough to the edge" of the freeze radius from Portland so that the Channel 36 operation in Roseburg would not preclude use of that channel for a TV service in Portland.

Here 3-J attempts to justify a waiver of the freeze zone in order to add a new television allocation to the table. This is not simply a waiver of the rules in order to pursue an existing channel allocation as was the case in KMTR. Thus 3-J must meet a substantial burden in order to justify a waiver. Waivers of Commission rules at the allocation stage of any broadcast frequency has always imposed a much greater burden on the proponent than a spacing waiver sought with an application for a construction permit to implement a channel assignment already allotted on the table. Clearly, 3-J has not met this burden.

Even if the procedural burdens imposed on a proponent seeking a waiver at the allocation stage were not involved, the factual basis of the KMTR decision is easily distinguished from 3-J's circumstances. In KMTR the petitioner sought only a modest spacing waiver of 19.5 kilometers for an established frequency. In this instance, 3-J is seeking a waiver of the spacing criteria of some 86.7 kilometers, or more than four times the magnitude of the waiver allowed in KMTR in order to allocate the channel. 3-J proposes to utilize Channel 38 with a transmitter site located at Aubrey Butte. Aubrey Butte is a highly congested electronic site owned by the City of Bend. The feasibility of this proposal is highly suspect in view of the fact officials of the City of Bend and Deschutes County have made it clear that a moratorium has been placed on any additional broadcast or radio towers on this site. Thus even if Channel 38 could be allocated to Bend, it is likely the amount of short spacing to Portland would be increased if 3-J were to find an available

site. Thus, both procedurally and factually, 3-J fails to meet the "compelling reasons" standard required by the Commission.

In view of the above, the Petition for Reconsideration filed by 3-J Broadcasting Company must be rejected and the dismissal of its Petition for Rulemaking should be affirmed.

Respectfully submitted,

LUVAAS, COBB, RICHARDS & FRASER, P.C.
Attorneys for Resort Broadcasting, Inc.

By *J. Dominic Monahan*
J. DOMINIC MONAHAN

DATED: September 8, 1994

DECLARATION

I, JOHN C. LARKIN, Vice President and General Manager of Resort Broadcasting Company, the licensee of Station KTVZ(TV), Bend, Oregon, declare under penalty of perjury that I have read the attached Opposition to Petition for Reconsideration of the rulemaking filed by 3-J Broadcasting Company. I further declare that the facts set forth therein are true and correct to the best of my knowledge and belief.


JOHN C. LARKIN

Declaration


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CERTIFICATE OF SERVICE

I, Nancy Lee Kemper, a secretary in the law offices of Luvaas, Cobb, Richards & Fraser, P.C., certify that I have on this 8th day of September, 1994 sent by Federal Express, on behalf of Resort Broadcasting Company, copies of the foregoing "Opposition to Petition for Reconsideration" to:

John Karousos, Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau
Federal Communications Commission
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Washington, D.C. 02544

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Company



Nancy Lee Kemper